

**United States Department of Labor  
Board of Alien Labor Certification Appeals  
Washington, D.C.**

DATE: February 2, 1998

CASE NO: **96 INA 188**

In the Matter of:

**C.A.S. INTERNATIONAL DEVELOPMENT,**  
Employer

On Behalf of:

**BING HUA GU,**  
Alien

Appearance: L. A. Baumann, Esq., of Agana, Guam.

Before: Huddleston, Lawson, and Neusner  
Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of the BING HUA GU, (Alien) filed by C.A.S. INTERNATIONAL DEVELOPMENT, (Employer), pursuant to § 212(a)(14)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (14)(A) (the Act), and regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at San Francisco, California, denied this application, the Employer requested review pursuant to 20 CFR § 656.26.<sup>1</sup>

**Statutory authority.** An alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient U. S. workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of

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<sup>1</sup>The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File (AF), and written arguments of the parties. 20 CFR § 656.27(c).

the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. See 8 U.S.C. § 1182(a)(14)(A). An employer desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. Such requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability at that time and place.<sup>2</sup>

## STATEMENT OF THE CASE

**Application.** On October 26, 1994, the Employer applied for labor certification to enable the Alien, a national of China, to fill the job of "Cement Mason." AF 21-23, 36-38. The position offered was classified as "Cement Mason" under DOT Occupational Code No. 844.364-010.<sup>3</sup> The Employer described the job as follows:

Smooths and finishes surfaces of poured concrete floors, walls, sidewalks, or curbs to specified textures, using handtools or power tools, including floats, trowels, and screeds: Spreads concrete to specified depth and workable consistency, using float to bring water to surface and produce soft topping. Levels, smooths, and shapes surfaces of freshly poured concrete, using straightedge and float or power screed. Finishes concrete surfaces, using power trowel, or wets and rubs concrete with abrasive stone to impart finish. Removes rough or defective spots from concrete or epoxy compound. Molds expansion joints and edges, using edging tools, jointers, and straightedge. May sprinkle colored stone chips, powdered steel, or coloring powder on concrete to produce prescribed finish. May produce rough concrete surface, using broom. Mixes cement, using hoe or concretemixing machine.

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<sup>2</sup>Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

<sup>3</sup>**844.364-010 CEMENT MASON** (construction) alternate titles: cement finisher; cement paver; concrete finisher; concrete floater. Smooths and finishes surfaces of poured concrete floors, walls, sidewalks, or curbs to specified textures, using handtools or power tools, including floats, trowels, and screeds: Signals concrete deliverer to position truck to facilitate pouring concrete. Moves discharge chute of truck to direct concrete into forms. Spreads concrete into inaccessible sections of forms, using rake or shovel. Levels concrete to specified depth and workable consistency, using hand held screed and floats to bring water to surface and produce soft topping. Smooths, and shapes surfaces of freshly poured concrete, using straightedge and float or power screed. Finishes concrete surfaces, using power trowel, or wets and rubs concrete with abrasive stone to impart finish. Removes rough or defective spots from concrete surfaces, using power grinder or chisel and hammer, and patches holes with fresh concrete or epoxy compound. Molds expansion joints and edges, using edging tools, jointers, and straightedge. May sprinkle colored stone chips, powdered steel, or coloring powder on concrete to produce prescribed finish. May produce rough concrete surface, using broom. May mix cement, using hoe or concrete -mixing machine. May direct subgrade work, mixing of concrete, and setting of forms. May specialize in finishing steps and stairways and be designated Step Finisher (construction). May break up and repair old concrete surfaces, using pneumatic tools, and be designated Cement Mason, Maintenance (any industry). May spread premixed cement over deck, inner surfaces, joints, and crevices of ships and be designated Cementer (ship-boat mfg.). GOE: 05.05.01 STRENGTH: H GED: R3 M3 L2 SVP: 7 DLU: 81

AF 37.<sup>4</sup> Employer, whose business is Construction, also stated that the employee would work a basic forty hour week from 8:00 AM to 5:00 PM, with overtime as required, for a wage of \$9.48 per hour and \$14.22 per hour for overtime. When advertised and posted the job offer produced no applications, and Employer's application was then referred to the U. S. Department of Labor by the Alien Labor Processing & Certification Division of the Guam Department of Labor. AF 18-20.

**Notice of Finding.** The March 10, 1995, Notice of Finding ("NOF") advised the Employer that the CO would deny certification, subject to the Employer's rebuttal. The defect noted in the NOF arose from the geographic location of Employer's proposed place of employment in Guam, which is remote from the continental U. S. labor market. As a result of the negative response to Employer's recruitment effort, the CO implemented 20 CFR § 656.24(b) (2)(i), which required him to determine whether or not other appropriate sources exist where the Employer might be able to recruit U.S. workers for this job. The CO found that in the continental U. S., particularly California, a high unemployment rate existed with a high rate of response to advertised job openings. As he inferred that qualified U. S. workers were then available and interested in employment on Guam, the CO directed the Employer to recruit in California by placing an advertisement in either the Los Angeles Times or the San Francisco Chronicle. The remainder of the NOF consisted of explicit instructions as to the procedures the Employer was required to follow in complying with the CO's instructions to engage in further recruitment.

**Rebuttal.** Employer's response indicated immediate compliance with the CO's instructions without exception, but requested reasonable time extensions based on the practical difficulties that were being encountered due to the remoteness of Guam from the California mainland, where such recruitment was to take place as the CO had directed. Repeated time extension requests were filed and granted on April 11, 1995, and May 17, 1995, and on

June 6, 1995, when the Employer was told to mail the required documentation of the recruiting activity on or before June 16, 1995. AF 07-13. On June 28, 1995, the Employer responded to the NOF, describing its compliance with the CO's instructions: First, the Employer had placed a recruiting advertisement in the San Francisco Chronicle on May 10<sup>th</sup>, 11<sup>th</sup>, and 12<sup>th</sup>, as directed by the NOF. Second, on June 26, 1995, the Guam Employment Service told the Employer that it did not receive any applications for this position, and the Employer noted that no U. S. workers were referred for the job. Finally, the Employer reported that a notice was duly posted at its workplace, to which no responses were received. As the Employer now had advertised the job twice without locating a qualified U. S. worker, it observed that its application had been pending since October 26, 1994, and it requested labor certification for the position. AF 04-07.

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<sup>4</sup>This is verbatim quotation of Part 13 of ETA 750, Part A, Offer of Employer. The text, which appeared to reproduce most of the DOT job description at Occupation Code No. 844.364-010, omitted part of one sentence. It is sufficient for the purposes of this proceeding, however.

**Final Determination.** On July 5, 1995, the CO denied alien labor certification on grounds that the Employer had failed to rebut the NOF of March 8, 1995, before June 16, 1995, an extended filing date that the CO had fixed in response to the Employer's repeated requests for time extensions.

**Appeal.** On July 14, 1995, the Employer requested reconsideration of the denial of this application, which the CO denied, citing **Harry Tancredi**, 88 INA 441(Dec. 1, 1988). This matter was then referred for review by BALCA. Employer's motion requesting reconsideration pointed out that

The rebuttal due date on the above applications were June 6, 1995. We requested an extension. The extension was granted by you on June 13, 1995 and gave us until June 16, 1995.(3 days). Your notice left your office June 15, 1995 (see postmark). Your notice was not received by us until June 20, 1995[,] which was after the due date. Our extension re-quest was for 30 days (that is until July 7, 1995). Our rebuttal was filed June 28, 1995.

AF 01.

## **Discussion**

The circumstances under which this application was denied suggest that the Employer could have been given greater leeway in its requests for time extensions without harming the administration of the Act. While the June 28, 1995, filing was an untimely compliance with the NOF, there was no question of the Employer's acquiescence and its intention to undertake all of the recruiting activities that the CO had directed from the time that it first requested a time extension on April 11, 1995. Moreover, the plain facts of geography, distance, and the inherent practical delays reasonably to be expected in communicating were both implicit and expressed in the exchange of letters between the CO and Employer.

The CO's decision to treat the late filing as a Motion for Reconsideration of the denial of certification was reasonable, but the denial upon reconsideration was not. The Employer was complying with a second, off island recruiting activity that it undertook because the CO found in the NOF that no response had been received after Employer's normal recruiting action pursuant to the regulations and to the local agency's instructions. No defect in the recruitment of any kind was cited in the denial on reconsideration; and no consideration appears to have been given to the circumstance that report of the result of rerecruitment was not sent out by the Guam Employment Service until June 26, 1995, ten days after the CO's time extension required the rebuttal to be mailed by the Employer. AF 06-07.

As the Employer explained in the Statement of Employer addressed to BALCA in support of this appeal,

Mailing time alone from San Francisco to Guam frequently exceeds seven days. ... Prior to filing our rebuttal we also needed a letter from the Guam Employment Service confirming that no applicants had responded to our S[an] F[rancisco] Chronicle ad. Guam is a remote island in the Pacific 6,000 miles from the mainland. Placing ads in the San Francisco Chronicle and receiving responses by mail takes more time than if we were located in California. Mailing of correspondence takes longer in both directions.

Although Employer's rebuttal documents were mailed on June 28, 1995, the failure of the CO's July 5, 1995, to make any mention of their arrival before that date confirms Employer's statement that the mail service between Guam and the mainland is much slower than the service between points on the mainland to which the CO apparently is accustomed.

While the CO's failure to give weight to the evidence of record in weighing Employer's Motion for Reconsideration would make appropriate an order remanding this application because the CO overlooked the results of Employer's diligent compliance with the NOF directions, the panel also is aware that no U.S. worker has applied for the job, even though the Employer has made two good faith tests of the labor market in attempting to fill this position. As there is no question that the objects of the Act have been fulfilled in this case, the following order will enter.

### **ORDER**

This application is hereby remanded to the Certifying Officer with directions to issue the alien labor certification that the Employer has requested forthwith.

For the Panel.

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FREDERICK D. NEUSNER  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain

uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

